

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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**AMENDED ORDER DENYING
MOTION FOR
RECONSIDERATION**

21 MC 97 (AKH)
21 MC 101 (AKH)

ALVIN K. HELLERSTEIN, U.S.D.J.:

The Transportation Security Administration ("TSA") moves for reconsideration of my March 31, 2006 Opinion and Order (the "March 31 Opinion"), and asks that I vacate the Opinion or, in the alternative, grant a stay pending consideration regarding appeal. TSA asserts that my March 31 Opinion intrudes upon its exclusive jurisdiction to make final determinations, and the exclusive jurisdiction of the Courts of Appeals to review its final determinations, as to defining and protecting Sensitive Security Information ("SSI"). See 49 U.S.C. § 46110; see also Final Order of Requests for Conditional Disclosure of SSI, dated February 7, 2006.

TSA misapprehends the nature of my March 31 Opinion. The Opinion does not define SSI, or modify or seek to review TSA's final determination concerning SSI. The Courts of Appeals alone have jurisdiction to review final determinations of TSA.

The purpose of my Opinion was to set out a procedure that would enable the plaintiffs to take the depositions of the airlines, the airports, and the aircraft security companies. The 300 wrongful death and personal injury cases over which I preside cannot progress unless those depositions are taken and, unless they progress, none of the 3,000 other September 11 cases on my docket can progress. It was wrong of TSA to

order their lawyers not to attend those depositions and to seek to shift their responsibilities to others, putting the lawyers for the private defendants into inexorable conflict. Happily, TSA has corrected its position, and announces in its current motion that its lawyers will now participate and, presumably, assume responsibility to make objections to prevent SSI from being disclosed.

It is without dispute that the Courts of Appeals have “exclusive jurisdiction to affirm, amend, modify or set aside” final orders issued by TSA pursuant to 49 U.S.C. § 114(s). See 49 U.S.C. § 46110. District Courts are without jurisdiction to entertain challenges to TSA’s determinations. See *Gilmore v. Gonzales*, 435 F.3d 1125, 1133 (9th Cir. 2006); *Merritt v. Shuttle, Inc.*, 245 F.3d 182, 187 (2d Cir. 2001); *Chowdhury v. Northwest Airlines Corp.*, 226 F.R.D. 608, 614 (N.D. Cal. 2004). I seek neither to trammel on that jurisdiction, nor to question the authority of TSA to make final determinations with regard to SSI.

As I pointed out in my March 31 Opinion, Congress gave to this District Court, the United States District Court for the Southern District of New York, “original and exclusive jurisdiction over all actions brought for any claim (including any claim for loss of property, personal injury, or death) resulting from or relating to the terrorist-related aircraft crashes of September 11, 2001.” Air Transportation Safety and System Stabilization Act (“ATSSSA”), § 408(b)(3), Pub. L. 107-42, 115 Stat. 230 (2001) (codified at 49 U.S.C. §§ 40101 note). An inherent aspect of this jurisdictional grant is the right and obligation to regulate pre-trial and trial procedures, including the conduct of depositions, with the aim of advancing the litigants’ interest in a fair and prompt adjudication of their legal claims.

Here, no further progress may be had absent the completion of discovery, both by document production and by taking of depositions. Faced with the inability of the parties to reach a consensus as to the conduct of depositions and with TSA's refusal to attend same, I directed that depositions proceed in the ordinary course provided by Rule 30(c), Fed. R. Civ. P., except that the persons in the deposition room were to be limited to those who previously had been cleared by TSA or who were otherwise entitled by TSA regulations to be present and with all resulting transcripts to be sealed pending review by TSA. There is nothing in that order that intrudes on TSA's jurisdiction. But TSA cannot extend its jurisdiction to intrude on the jurisdiction of this court, and the constitutional rights of litigants to due process with regard to their advancing their claims against the airlines, the airports, and the aircraft security companies through lawsuits in this court specifically authorized by the ATSSSA. ATSSSA § 408(b)(3). Nor is there anything in my previous Order that imposes undue burden on TSA. The concern that TSA states that 125 plaintiffs' lawyers are clamoring for clearance is not real. I have stated from the beginning of these cases and on numerous occasions that representation for depositions can be by small committee and, in general and for both parties, I stand ready to regulate procedures to promote justice, economy, and efficiency in the public interest and without compromising the safety of the American public or TSA's jurisdiction.

I ruled in my March 31 Opinion that TSA had to rely on its lawyers, and not on the lawyers of defendants, to raise objections to prevent disclosure of SSI. TSA now states agreement with that position. I ruled further that since many of plaintiffs' lawyers had been cleared by TSA to hear and see SSI, answers could be given and

recorded in sealed transcripts pending final determinations by TSA what should, and should not, qualify as SSI, allowing review therefrom to be brought to the Courts of Appeals. I ruled further that no one other than cleared lawyers and cleared stenographic reporters could enter the deposition room. These rulings also fall within my jurisdiction. Apparently TSA disagrees, and may seek recourse, if TSA so desires, by appropriate procedures in the appellate courts. TSA raises nothing in its motion for reconsideration that I failed to consider. Its disagreement with my rulings does not qualify as basis for a motion for reconsideration. TSA's motion to vacate the March 31 Opinion is denied.

I also deny TSA's motion for an additional stay. These depositions have been discussed since November 2005, and earlier. TSA was given ample notice of the depositions that were scheduled to begin the first week of April 2006. It knew, from letters filed March 9, 2006, that a ruling ordering those depositions to proceed was contemplated. My March 31 Opinion postponed the depositions another 30 days, to begin May 1, 2006, to give TSA time to pursue appellate remedies. TSA has delayed long enough. Its remedy, if any, should come from an appellate court, not from me.

SO ORDERED.

Dated: New York, New York
May 5, 2006


ALVIN K. HELLERSTEIN
United States District Judge